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No. 06-249

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SUPREME COURT, U.S.

In the Supreme Court of the United States

DIANNA ROBERTS,
Petitioner,

v.

WMC MORTGAGE CORPORATION; BANK ONE, N.A.; FAIRBANKS CAPITAL CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

LINDA JOHANNSEN, ESQ.
Counsel of Record
PRESTON GATES & ELLIS LLP
222 SW COLUMBIA
SUITE 1400
PORTLAND, OR 97201
(503) 228-3200

Counsel for Respondents

Becker Gallagher Legal Publishing, Inc. 800.890.5001

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

The trial court granted summary judgment to Respondents on Petitioner's claim for rescission under the Truth in Lending Act ("TILA"). Petitioner's appeal to the Ninth Circuit Court of Appeals asserted certain issues in her Statement of Issues and Amended Statement of Issues. Petitioner later raised additional new issues in her Reply Brief and raised even more issues in her Joint Petition for Panel Rehearing and Petition for Rehearing en Banc. Notwithstanding the numerous issues raised at various points in this case, one fact is not disputed--Petitioner never gave notice to Bank One, N.A., the successor by merger to First National Bank of Chicago, that she was seeking to rescind her loan, until she filed her lawsuit three years and eight months after the loan transaction closed. (Pet. at 23-24)

The Ninth Circuit Court of Appeals held that the district court lacked subject matter jurisdiction over the TILA rescission claim because Petitioner failed to deliver a notice of rescission to Bank One, the current beneficiary of the Deed of Trust, within TILA's three-year limitations period. (Pet. App. 2a). The court ordered the case dismissed. With respect to the claim for rescission, the only decision made by the Ninth Circuit was the decision on subject matter jurisdiction. All of the other issues raised by Petitioner were not expressly ruled on. Based on the Ninth Circuit's ruling, the only question is:

1. Whether the Ninth Circuit correctly applied the law as stated in its decision in *Miguel v. Country Funding Corp.*, 309 F.3d 1161, 1165 (9th Cir. 2002), *cert. denied sub nom., Miguel v. Bank of New York Trustee, under Pooling & Servicing Agreement Series 1995 B*, 539 U.S. 927, 123 S. Ct.

2577, 156 L.Ed. 2d 604 (2003), that the consumer's right to rescind expires if notice is not delivered to the beneficial interest holder of the Deed of Trust within three years after the consummation of the loan transaction.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondents include the following entities, including their predecessors:

1. WMC Mortgage Corp. ("WMC"), formerly known as Weyerhaeuser Mortgage Company, is a privately held California corporation that was incorporated in 1955. WMC is a wholly-owned subsidiary of WMC Finance Co., a Delaware corporation, which is a wholly-owned subsidiary of GE Capital Corporation.

2. JPMorgan Chase Bank, N.A. ("JPMorgan"), successor by merger to Bank One, N.A., which in turn was the successor by merger to First National Bank of Chicago, is a national banking association chartered and regulated by the federal Office of the Comptroller of the Currency. Pursuant to application, on or about October 13, 2004, the Office of the Comptroller of the Currency approved (a) the conversion of JPMorgan Chase Bank (a New York chartered bank) into a national banking association, and (b) the merger of two separate national banks, Bank One, N.A., Chicago, Illinois, and Bank One, N.A., Columbus, Ohio, with and into JPMorgan. JPMorgan is a wholly owned subsidiary of JPMorgan Chase & Co., which is incorporated under the laws of the State of Delaware with its principal place of business in New York, New York. The stock of JPMorgan Chase & Co. is publicly traded on the New York Stock Exchange under the symbol "JPM."

3. Select Portfolio Servicing, Inc. ("SPS"), formerly known as Fairbanks Capital Corp., is a Utah corporation that is a wholly owned subsidiary of SPS Holding Corp. ("SPSHC"),

a Delaware corporation formerly known as Fairbanks Capital Holding Corp. Since October 4, 2005, 100% of the outstanding shares of SPSHC have been owned by Credit Suisse First Boston (USA), Inc. ("CSFB").

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JURISDICTION

Respondents believe that the correct date that the Ninth Circuit denied Petitioner's joint petition for rehearing and petition for rehearing en banc was May 24, 2006, not July 22, 1999. Otherwise, Respondents agree with the statement of jurisdiction.

STATEMENT OF THE CASE

This case is a simple dispute over whether Petitioner was required to give notice to the assignee of the Deed of Trust on her personal residence within the three-year statute of limitations of 15 U.S.C. § 1635(f) that she asserted a right to rescind the loan transaction. There is no dispute that Petitioner did not give notice to the assignee—Bank One. (Pet. at 23-24) Notice was delivered to Bank One only when this lawsuit was filed and the summons served—more than eight months after the statute of limitations expired. The outcome of this case will not affect any other parties and is based solely on the facts of this individual case.

Under the Truth in Lending Act (the "TILA"), the obligor's right to rescind is supposed to last for three business days from the date of consummation of the loan. 15 U.S.C. § 1635(a). The rescission period can be extended for up to three years if the consumer does not receive a notice of her right to rescind or the proper disclosures at the loan closing. *Id.* § 1635(f); 12 C.F.R. § 226.23(a)(3). This Court has held that the consumer's rescission right under TILA § 1635(a) cannot be exercised, defensively or otherwise, after the three year period of § 1635(f) has run. *Beach v. Ocwen Federal Bank*, 523 U.S. 410, 419, 118 S. Ct. 1408, 1413, 140 L.Ed. 2d 566 (1998).

In her complaint, Petitioner alleges that she never received two copies of the notice of her right to rescind, which she argues extended the statute of limitations to three years. Petitioner does not challenge the accuracy of the required disclosures. The parties filed cross motions for summary judgment. The trial court found that Petitioner received the notice of her right to rescind because a signed acknowledgement was included in the closing escrow officer's file. (Pet. App. 8c) Petitioner appealed this finding to the Ninth Circuit. (Pet. App. 2a)

On appeal, Respondents argued that the court lacked subject matter jurisdiction over the rescission claim under the Ninth Circuit's decision in *Miguel v. Country Funding Corp.*, 309 F.3d 1161, 1165 (9th Cir. 2002). The Ninth Circuit held in *Miguel* that the consumer must deliver notice of her intention to rescind to the present holder of the note and Deed of Trust within the three-year rescission period. *Id.* If the notice is not delivered, the court is deprived of subject matter jurisdiction. *Id.*

It is undisputed among the parties that the consummation of the transaction occurred on August 26, 1998. The outside limit of Petitioner's rescission right was August 26, 2001. It is undisputed that notice was not delivered to Bank One on or before August 26, 2001. The decision of the Ninth Circuit applies the law as interpreted in its prior cases and on which this Court has denied review. The only issue to consider is whether the Ninth Circuit correctly applied the statute to the facts and dismissed the case for lack of subject matter jurisdiction. Contrary to Petitioner's argument, there are no conflicting decisions in other circuits. Furthermore, the Ninth Circuit never ruled on Petitioner's arguments about the definition of "creditor," the alleged errors on the assignment, the authority of the bank to conduct business, equitable tolling

or estoppel, or the interpretation of the Pooling and Servicing Agreement. The Court should deny the Petition because the case does not qualify for or otherwise merit review in this Court.

REASONS FOR DENYING THE PETITION

Petitioner states that the Ninth Circuit changed the meaning of the term "creditor" affecting who must be served with a notice of a consumer's election to rescind under 15 U.S.C. §§ 1635 and 1641 and Regulation Z. (Pet. at 8) She states that the Ninth Circuit is in conflict with the Fifth, Seventh, and Eleventh Circuits.

Notwithstanding Petitioner's repeated statements to the contrary, the decisions cited by Petitioner do not represent conflicts among the circuits. In addition, the only asserted errors are allegations of errors in factual findings, Accordingly, Petitioner has not carried her burden of demonstrating any "compelling reasons" for the Petition to be granted. *See* Sup. Ct. R. 10.

1. *There is No Conflict Among the Circuit Courts over the Meaning of the Term "Creditor."*

Petitioner requests that this Court resolve the conflict among the circuits over the meaning of the term "creditor." (Pet. at 8) There is no conflict among the circuits to resolve. Petitioner cites three cases in support of her conclusion that the circuit courts are split on the interpretation of the term "creditor." Petitioner has misread the cited cases.

In *Ellis v. General Motors Acceptance Corp.*, 160 F.3d 703 (11th Cir. 1998), the consumer sued only the assignee of the contract and did not join the original creditor. The

Eleventh Circuit held that, pursuant to 15 U.S.C. § 1641(a), an assignee could not be held liable for an alleged disclosure violation under the TILA because the defect, if one existed, was not apparent on the face of the document. The *Ellis* decision is simply an application of § 1641(a) to the facts of the case. This decision does not represent a conflict with the Ninth Circuit.

In *Taylor v. Quality Hyundai, Inc.*, 150 F.3d 689 (7th Cir. 1998), *cert. denied* 525 U.S. 1141, 119 S. Ct. 1032, 143 L.Ed. 2d 41 (1999), two consumers sued the assignees of car purchase contracts for violations of the TILA, claiming that the failure to disclose the fact that the dealer did not pay all of the money collected on an extended warranty to the party providing the warranty caused damage. The Seventh Circuit held that § 1641(a) of the TILA bars the plaintiffs' claims against the assignee because the alleged defect is not apparent on the face of the documents. As in *Ellis*, this is simply an application of the statute to the facts of the case. The Seventh Circuit did not discuss or consider the interpretation of the term "creditor" under the TILA in *Taylor*.

In *Riviere v. Banner Chevrolet, Inc.*, 184 F.3d 457 (5th Cir. 1999), consumers purchased a new vehicle from defendant Banner Chevrolet ("Banner") on a retail installment contract that was immediately assigned to General Motors Acceptance Corp. ("GMAC"). The consumers later sued Banner for alleged violations of the TILA, although the exact claim is not explained in the opinion. At trial, the district court held that Banner was not a "creditor" within the meaning of the TILA because the contract was assigned to GMAC. The Fifth Circuit reversed and remanded the case. The Fifth Circuit found that "[b]ecause the obligation is initially payable on its face to [Banner], [Banner] is the only creditor in the transaction." *Id.* at 460. The court arrived at

this decision by interpreting the facts consistently with the Federal Reserve Board's staff interpretation and the statute itself.

Of the cases cited by Petitioner as evidencing a split among the circuits, *Riviere* is the only case interpreting the term "creditor." In *Riviere*, the Fifth Circuit interpreted the term "creditor" consistently with the Ninth Circuit's decision in this matter. The "creditor" is the party to whom the obligation is initially payable; the assignee is not the creditor. In this case, WMC Mortgage Corp. was the "creditor" and Bank One was the assignee that did not receive notice of Petitioner's attempt to rescind her mortgage loan within three years of the loan closing.

The Ninth Circuit's decision in this case is in accord with the Fifth Circuit's decision in *Riviere*. The Seventh Circuit case and the Eleventh Circuit case cited by Petitioner are not on point. The Court should deny the Petition because there is no split among the circuit courts and Petitioner has failed to raise a compelling reason to grant the Petition.

II. *Petitioner's Argument that the TILA does not Require Notice to the Assignee is not Supported by the Statute and Violates Due Process.*

Petitioner argues that there is no requirement to deliver notice to an assignee that the consumer is electing to rescind the loan transaction. (Pet. at 14-15) Petitioner argues that delivery of the notice to the original creditor is all that is required because "creditor" is defined in 15 U.S.C. § 1602(f) as the original creditor.

Viewed in context of the TILA, the right to rescind is intended to be a three business day process, so it is logical

that Congress has not adopted separate provisions for assignees. However, the Court should look at the entire statutory scheme of the TILA to determine Congress's intent regarding rescission rights and parties entitled to notice.

Section 1641(c) provides that "[a]ny consumer who has the right to rescind a transaction under section 1635 * * * may rescind the transaction as against any assignee of the obligation." Assuming that Petitioner's right to rescind was extended to three years, there is nothing in the statute that implies that she was not required to deliver notice of her election to rescind to the assignee. The statute simply authorizes the consumer to rescind against an assignee. Where, as here, the right to rescind under § 1635(f) has been extinguished before notice is delivered to the assignee, the right no longer exists. *Beach v. Ocwen Federal Bank*, 523 U.S. 410, 419, 118 S. Ct. 1408, 1413, 140 L.Ed. 2d 566 (1998); *Miguel v. Country Funding Corp.*, 309 F.3d 1161, 1165 (9th Cir. 2002), *cert. denied sub nom.*, *Miguel v. Bank of New York Trustee, under Pooling & Servicing Agreement Series 1995 B*, 539 U.S. 927, 123 S. Ct. 2577, 156 L.Ed. 2d 604 (2003).

Congress differentiated between the original creditor and an assignee by providing a narrower scope of liability for assignees in 15 U.S.C. § 1641. Congress expressly provided that an assignee can be subject to the consumer's right of rescission, 15 U.S.C. § 1635(c), but

> [a]n obligor shall have no rescission rights arising solely from the form of written notice used by the creditor to inform the obligor of the rights of the obligor under this section, if the creditor provided the obligor the appropriate form of written notice published and adopted by the Board, or a comparable

> written notice of the rights of the obligor, that was properly completed by the creditor, and otherwise complied with all other requirements of this section regarding notice.

15 U.S.C. § 1635(h). It is clear that a consumer's rescission rights are not as broad against an assignee compared to the rights against the original creditor. It is illogical to assume that the assignee is not entitled to any notice that the consumer intends to exercise the right.

Congress also restricted the consumer's ability to recover damages in a civil action against an assignee to those cases where disclosure violations were "material" or the required form was not provided. 15 U.S.C. § 1641(a). In cases where the obligation is secured by real property, an action for damages may be maintained only if the violation of the disclosure requirement is apparent on the face of the disclosure statement and the assignment is voluntary. 15 U.S.C. § 1641(e). In this respect, Congress has clearly provided for different treatment of the original creditor from an assignee. It follows that Congress did not intend that an assignee would be treated the same as the original creditor for purposes of the consumer's exercise of his or her right to rescind.

Petitioner admits that she never delivered notice to Bank One, the beneficial interest holder of record for her trust deed as of August 26, 2001 before the rescission period expired. (Pet. at 23-24) Without notice, Bank One is allegedly required to relinquish its security interest in the real property and disgorge all monies paid by Petitioner. 15 U.S.C. § 1635(b); 12 C.F.R. § 226.23(d). Before such a harsh remedy should be applied, an assignee of record is entitled to due process in the form of actual notice that the claim has

been asserted. The Court should bear in mind that the assignment to Bank One's predecessor was recorded approximately one year before Petitioner delivered her notice. Petitioner claims that she did not find the assignment, but the document is a matter of public record. Even if Petitioner did search and failed to find the assignment, it shows that the only questions involve evidence and facts, which is not a compelling reason for review by this Court. The Court should deny the Petition.

III. *Petitioner Failed to Raise the Issue of Errors on the Assignment Before the Trial Court and Such Arguments are Therefore Waived.*

A. The Assignment is Not Flawed or Unenforceable.

Petitioner argues that the Ninth Circuit erred when it accepted an assignment without the correct spelling of her first name and without an address for the assignee. (Pet. at 15-19) This Court does not grant a petition to correct an error of the circuit court. *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 122, 114 S. Ct. 1359, 1362 (1994).

Oregon's system of recordation relies primarily upon the legal description of the real property. So long as a document describes the real property by giving either (a) the subdivision with boundaries, lots, blocks, addition names, or (b) partition plat recording and parcel numbers, or (c) the boundaries by metes and bounds, or (d) by reference to the book, document number or fee number of any public record, the document may be recorded. ORS 93.600 (emphasis added). The assignment in question was acknowledged by a notary and referenced the instrument number and date of the Deed of

Trust that was assigned. (Pet. App. 2n) That is all that is required under Oregon law. ORS 93.710(1).

Petitioner does not allege that she gave notice to First National Bank of Chicago ("FNBC"), the assignee of record when she decided to rescind. It makes no difference if her first name is spelled incorrectly on the assignment or if the address for FNBC was omitted. She did not find the assignment and thus, did not attempt to give notice to FNBC or its successor by merger, Bank One.

Even if the assignment is flawed, which Respondents deny, an error by the court of appeals does not provide a compelling reason to grant the Petition.

B. The Uniform Commercial Code does not Apply to Real Property Security Interests.

Petitioner argues at some length about the Uniform Commercial Code ("UCC") and perfection of instruments through possession. (Pet. at 16) Article 9 of the UCC does not apply to "the creation or transfer of an interest in or lien on real property . . . ." ORS 79.0109(4)(k). Conveyances of real property are governed by ORS Chapter 93. Security interests in real property in the form of a Deed of Trust are governed by ORS Chapter 86, in particular ORS 86.705 *et. seq*. Thus, Petitioner's arguments about possession of the instrument and the UCC are not relevant.

C. The Notarial Protest has No Legal Force or Effect.

Petitioner makes an argument about her "presentment of notice of dishonor" under UCC § 3-504(a); ORS 73.0504(a). (Pet. at 16 & 23) Article 3 of the UCC applies to negotiable

instruments such as checks. It has nothing to do with security interests in real property. The cited statute has to do with whether a party is excused from making a demand for payment after a negotiable instrument is dishonored, i.e. the check bounced. As explained by Professors White and Summers:

> [Section] 3-504(a) excuses lapses in presentment [demand for payment] where the person "cannot with reasonable diligence make presentment," where the maker or acceptor has repudiated his obligation to pay or is dead or insolvent, where the instrument specifies that presentment is not necessary, where the drawer or indorser has waived presentment "or otherwise has no reason to expect or right to require that the instrument be paid or accepted," or where "the drawer instructed the drawee not to pay or accept the draft or the drawee was not obligated to the drawer to pay the draft."

J. White & R. Summers, Uniform Commercial Code §16-9 at 101 (4th ed. West Pub. 1995).

Petitioner claims that she exercised her remedy under Oregon law and had a "notarial protest" created and delivered. (Pet. at 16 & 23) The "notarial protest" is appended to Petitioner's brief as Appendix O. It purports to repudiate the debt of Petitioner based on the notary's review of the documents. It appears that the notary has appointed himself the fact finder based on his license as a notary to decide that Petitioner rescinded her Deed of Trust.

There is no legal basis for this document, and both the document and the argument should be disregarded by the

Court. In addition, Petitioner failed to preserve any issue regarding this argument and it is therefore waived.

IV. *Petitioner Failed to Raise or Preserve any Argument Concerning the Bank's Existence.*

The entire argument concerning First National Bank of Chicago ("FNBC") and Bank One should be disregarded. Petitioner has known since the lawsuit was filed in April 2002 that Bank One was the successor to FNBC through a merger. Plaintiff never raised this issue to the trial court or the court of appeals. The issue, to the extent an issue exists, was waived by Petitioner failing to raise it below.

V. *Arguments Regarding Equitable Tolling and/or Estoppel were Not Preserved or were Waived.*

Petitioner argues that the Ninth Circuit erred by not accepting her arguments that the statute of limitations under the TILA should be equitably tolled or that Bank One should be equitably estopped from denying her claim on the basis of the expiration of the statute of limitations. (Pet. at 21-26) Petitioner argues that this Court can toll the running of the statute of limitations under principles of equity if the application of the statute is unfair. (Pet. at 21)

This Court has held that the TILA "permits no federal right to rescind, defensively or otherwise, after the 3-year period of § 1635(f) has run." *Beach v. Ocwen Federal Bank*, 523 U.S. 410, 419, 118 S. Ct. 1408, 1413, 140 L.Ed. 2d 566 (1998). The issue in *Beach* concerned the consumers' attempt to use their right to rescind defensively against the lender in a judicial foreclosure action brought six years later. The consumers argued that the rescission right could be used defensively as a setoff or recoupment claim to the foreclosure

action even though brought after a statute of limitations expired. This Court held that the plain language of § 1635(f) extinguishes the consumer's right to rescind rather than simply compels the consumer to bring an action within three years.

Applying this Court's analysis in *Beach* to this case, the statute of limitations in § 1635(f) extinguished Petitioner's right to rescind against Bank One because notice was not delivered within three years. The Court should decline Petitioner's invitation to extend that right by equitably tolling the statute. There is nothing in the record that provides a basis for this relief against Bank One.

VI. *Arguments Regarding the Pooling and Servicing Agreement were Never Properly Raised and Preserved.*

Petitioner makes numerous statements based upon her interpretation of the Pooling and Servicing Agreement. (Pet. at 26-30) She has included only five pages (Appendices P, S and U) of the document.

The Pooling and Servicing Agreement was provided to Petitioner in discovery. If Petitioner wanted to argue issues regarding the Pooling and Servicing Agreement, the entire agreement should have been submitted to the trial court in the first instance. As noted by the trial court, "[t]he significance of the Pooling and Servicing Agreement is * * * unclear because only parts of the Agreement are in the record, and none of the parties explains the function of the document or its relevance to Plaintiff's claims." (Pet. App. 5c) Petitioner did not appeal this finding. Petitioner now includes select portions of the agreement for this Court to consider. The arguments or issues regarding the Pooling and Servicing

Agreement were not preserved or raised below and are waived.

CONCLUSION

Petitioner has not established a compelling reason for this Court to grant the Petition. Therefore, Respondents respectfully request that the Petition be denied.

Respectfully submitted,

LINDA JOHANNSEN
Counsel of Record
PRESTON GATES & ELLIS LLP
222 SW Columbia Suite 1400
Portland, OR 97201
(503) 228-3200

Counsel for Respondents